V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

COMMONWEALTH OF VIRGINIA

v. Case Nos.

XXXXXX XXXXXXXXX

TRIAL MEMORANDUM

Under Virginia law, embezzlement and larceny are separate offenses. There is no general theft statute, as there is in most states, which encompasses both types of behavior. *United States v. Good*, 326 F.3d 589 (4th Cir. 2003). The key distinction between embezzlement and larceny is that larceny involves a trespassory taking of property while embezzlement involves a conversion of property received in trust or with the owner's consent. *Smith v. Commonwealth*, 222 Va. 646, 649 (1981). In a prosecution for embezzlement, the Commonwealth must prove that the defendant was entrusted with the property of another. *Chiang v. Commonwealth*, 6 Va. App. 13 (1988). In a prosecution for larceny, on the other hand, the Commonwealth must prove the taking of the property was without the consent of the owner. *See Skeeter v. Commonwealth*, 217 Va. 722 (1977).

Nowhere in Title 18.2 of the Virginia Code is the term "Consent" defined. Definitions of Consent are typically drawn from case law and depend on the type of crime involved. Even Black's Law Dictionary gives a lengthy definition of Consent, with various sub-definitions for terms such as "Express Consent", "Informed Consent", "Implied Consent" and several others. Black's Law Dictionary, *Consent* (9th Ed. 2009). The definition of Consent under Black's Law Dictionary recognizes the "capacity to consent" as an issue. According to Black's, "Consent may be a defense to a crime if the victim has the capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent." *See* Black's Law Dictionary, *Consent*, *Id.*

There is no case law in Virginia, other than interpretations under various sexual assault codes, which has dealt with the issue of whether consent purportedly given by a person with mental incapacities to a person who knew or should have known of the suffered incapacity would be valid under the various criminal codes. While the rape statute specifically speaks of a victim suffering from "physical helplessness" or "mental incapacity", nowhere does the Virginia Code or any Virginia case law address mental incapacity and consent pertaining to larceny or fraud offenses.

This Defendant is charged with credit card theft, which like larceny, requires proof of a taking without the consent of the cardholder. *See* Virginia Code § 18.2-192. The preceding code section, § 18.2-191, sets forward definitions for a number of terms used in Article 6, the article relating to Credit Card offenses. Consent is not a defined term.

Many other states have tackled this issue of consent and mental incapacity in property crimes. In other states, proof of a lack of consent, where consent was purportedly given, has been proven with approval, by a showing of evidence that the defendant knew the victim lacked the mental capacity to consent to the taking of his or her property. *See State v. Calonico*, 256 Conn. 135, 154 (1996) (citing *Deranger v. State*, 652 So.2d 400, 401 (Fla. App. 1995)). In essence, the theory accepted in many states is that a mentally incompetent person cannot consent. *See e.g., Calonico*, 256 Conn. at 153 (citing *People v. Cain*, 238 Mich. App. 95, 128 (1999) (holding that when the state claims that there is no knowing and voluntary consent to the taking of property because of the property owner's mental incapacity, mental incapacity may be considered by the trier of fact as a theory demonstrating at least one of the elements of the crime, namely failure to consent to the taking and carrying away notwithstanding that mental capacity is not, itself, an element of larceny; *see also People v. Camiola*, 225 App. Div.2d 380, 380-81 (1996)).

A number of states have held that "[E]ven without an express statutory provision . . . mental deficiency on the part of the victim, which is known or should be known to the defendant, can render ineffective the apparent consent by the victim in a prosecution for theft . . ." *Gainer v. State*, 553 So.2d 673, 679 (Ala. Crim. App. 1989); cf. *Lucas v. State*, 183 Ga. App. 637, 642 (1987); *Cain*, 238 Mich. App. at 128-29.

In some of those states, there is a presumption that all human beings are of sound mind. The burden still rests on the state to prove that the victim was not of sound mind and that he or she was, therefore, incapable of consenting to a transfer of property. *See e.g., Calonico*, 256 Conn. at 155; *Lucas*, 183 Ga. App. at 640.

Several other states have adopted specific statutory provisions vitiating consent obtained from one whom the defendant knows or should know lacks the mental capacity to voluntarily and intelligently give such consent. *See e.g.*, Colo. Rev. Stat. § 18-1-505(3) (1986); Tex. Pen. Code Ann. § 31.01(4)(C) (1974). In *Urdiales v. State*, 751 S.W.2d 269 (Tex. App.1988), the defendant's conviction of theft based on obtaining large checks from his neighbor, an elderly, recently widowed, and schizophrenic woman, was affirmed under such a statute.

Illustrative Cases—Larceny and Theft Convictions Upheld

Each of the cases below represent state appellate court decisions where a claimed defense of consent to larceny was rejected, and larceny or theft convictions were upheld, based on the premise that consent was invalid due to the mental incapacity of the victim and knowledge at the time of the perpetrator. All of the jurisdictions in the referenced cases below, similar to Virginia, lacked a specific statutory provision nullifying consent gained under those circumstances:

a. Alabama

In *Gainer v. State*, the Court of Criminal Appeals of Alabama affirmed a conviction for larceny, finding that the victim lacked the physical and mental capacity to understand or manage her financial affairs and that appellant knew of victim's diminished mental capacity and used this knowledge to assume "unauthorized control" of victim's financial affairs, a necessary element for the charge under Alabama law. 553 So.2d at 681. The evidence was summarized as follows:

> … [T]he victim was an elderly, sick woman, without close family, and of an extremely frugal nature. After her release from Tyson Manor Nursing Home, she was not always mentally acute. She was very vulnerable to being preyed upon by unscrupulous persons. [Appellant], apparently aware of the situation, stated that she was going to take care of the victim so the victim could remain at home. A new joint checking account was opened with [appellant]. An existing checking account was changed to a joint account with [appellant]. Thereafter, large sums of money, which were derived from the victim's investments, past employment, or other sources not connected with [appellant], flowed out of these accounts for the benefit of [appellant] or her family. However, [appellant] intimated to a distant relative of the victim that she was on the account only to pay the victim's bills and the sitters as the victim was incapable of handling her financial affairs. *Id.*, at 680.

Based on the evidence presented, appellant's conviction for theft of property was upheld.

Id., at 685. The Court, in affirming the theft conviction, interpreted "nonconsent", a necessary element under the Alabama statute. *Id.* At 679 (citations omitted). The Court cited legal treatises for the proposition that "apparent consent is not effective unless, as a factual matter, it is voluntary and intelligent." *Id., quoting* C. Torcia, 1 Wharton's Criminal Law, §46 at p. 231 (14th ed. 1978). The Court ultimately opined that, '[e]ven without an express statutory provision to that effect, mental deficiency on the part of the victim, which is known or should be known to the defendant, can render ineffective the apparent consent by that victim in a prosecution for theft . . ." *Id.*

b. Connecticut

In *State v. Calonico,* the Supreme Court of Connecticut affirmed appellant's conviction for larceny where she appropriated approximately $800,000 of victim's money over a three week period into appellant's account and the accounts of her family and friends. 256 Conn. at 141. The victim was an elderly, childless widow who was diagnosed with dementia, and characterized by several witnesses as often being confused and disoriented. *Id.,* at 140, 157-58. The court held that, based on the evidence, the trial court could have reasonably concluded that the victim was mentally incapable of consenting to the transfer of her assets, that the defendant was aware of that fact, and as a result, the taking was nonconsensual and wrongful. *Id.,* at 159-60. The Connecticut larceny statute has elements essentially the same as larceny in Virginia. The Court interpreted its Code to allow circumstantial evidence to show that there was no "knowing and voluntary consent to the taking of property because of the property owner's mental incapacity[. M]ental incapacity may be considered by the trier of fact as a 'theory . . . demonstrat[ing] at least one of the elements of the crime, [namely] failure to consent to the taking and carrying away' notwithstanding that mental capacity is not, itself, an element of larceny." *Id.* At 153-154 (Citations and quotations omitted). Essentially, the Connecticut court adopted interpretations similar to those adopted by courts in Michigan and New York.

c. Florida

A Florida District Court of Appeals, in *Deranger v. State*, upheld convictions on three counts of grand theft where the defendant maintained an intimate relationship with an elderly man, accepted forty-seven checks from him totaling over $67,000, and deposited them into a joint account which she shared with her husband. *Deranger v. State*, 652 So.2d at 401. The court found that evidence of victim's failing mental status, in conjunction with the unusual number of sizeable checks to appellant and her husband over an extended amount of time, was sufficient to permit a jury to find that the transfers constituted theft. *Id.*

In *Starling v. State*, 677 So.2d 4, 6 (Fla. App. 1996), a separate District Court of Appeals upheld an appellant's conviction for grand theft where the evidence presented in trial was sufficient to show that the victim, an 81 year-old woman, lacked the mental capacity to place the appellant as a signatory on her accounts. Appellant formed a friendship with the victim, became her housekeeper, and eventually the victim placed appellant as a signatory on her checking account. *Id.,* at 5. Appellant used the money in the account for her own personal use. *Id.* Several witnesses testified that the victim was not lucid at the time she placed appellant's name on the account. In fact, her physician testified that the victim had been suffering from tertiary syphilis for several years, was generally confused, had memory loss, and suffered from hallucinations. *Id.,* at 6.

d. Georgia

The Court of Appeals of Georgia, in *Lucas v. State*, 183 Ga. App. 637 (1987), affirmed appellant's conviction for theft where appellant endorsed and cashed the victim's Social Security and retirement benefit checks, received at least one-half the proceeds of the victim's $15,000 savings account, which she liquidated, and purchased real estate from the victim at prices significantly below value. It was shown that appellant controlled well over $40,000 of the victim's money during the two and one-half year period he was caring for her. *Id.,* at 638. The victim was an elderly woman who had begun to exhibit signs of senility at the time appellant came into her life. *Id.*

e. Michigan

In *People v. Cain*, 238 Mich App. 95, 605 N.W.2d 28 (2000), the Court of Appeals of Michigan affirmed the trial court's finding that the victim, an elderly, childless widow, did not have the requisite mental capacity to consent to a written agreement allowing her limited guardian to use victim's money for her own professional and personal use. 238 Mich. App. at 35. There was evidence that the victim suffered either from "senile dementia" or "chronic brain syndrome." *Id.* The court upheld appellant's conviction for larceny, under a general larceny statute, where the evidence showed that appellant took approximately $250,000 from victim's account after knowing of victim's impaired mental capacity. *Id.* The Court interpreted the element requiring a lack of consent to be shown by proof of the state that the victim lacked capacity to consent. *Id.,* at 44.

f. New York

In *People v. Camiola*, 639 N.Y.S.2d at 36, a New York appellate court upheld a conviction for grand larceny where evidence presented at trial established that appellant maintained, “a pattern of thefts from the elderly and increasingly senile victim over a two-year period, in which he transferred by various means, usually accomplished by her signature, significant assets to his own purposes.” *Id.*, at 380. The Court found that the prosecution “proved beyond a reasonable doubt that the victim was incapable of consenting to appellant’s actions and that appellant was cognizant of her diminished mental capacity, yet continued to deplete her assets.” *Id.*, at 380-1. Again, the Court interpreted the New York general larceny statute, which required proof of “trespassory takings”, could be proven circumstantially by showing the victim’s lack of capacity to form consent. *Id.* at 380.

Summary

In conclusion, the Virginia courts have never been asked to interpret a definition of consent or determine the methods and manner to prove a lack of consent to a property crime by a mentally incapable victim who purportedly consented to the transfer of assets to a person who knew or should have known the victim lacked the capacity to consent. Many of the states which addressed this very issue recognized that a larceny may be proven by demonstrating that the victim did not consent to the taking because of a lack of capacity.

Accordingly, in this matter, the Court should adopt the reasoning accepted in these sister jurisdictions and find that, based on the facts of this case, due to the victim’s incapacity and knowledge by the defendant, the victim did not consent to the taking of the credit card in the name of her long deceased husband.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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